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A/AC.249/L.10
27 August 1996

ORIGINAL: ENGLISH

PARATORY COMMITTEE ON THE
STABLISHMENT OF AN
NTERNATIONAL CRIMINAL COURT
30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Jun YOSHIDA (Japan)

II. ORGANIZATION AND METHOD OF WORK

The work of the Preparatory Committee during its March-April session llowed the programme suggested by the Bureau and focused on the following estions: scope of jurisdiction and definition of crimes, at its 1st to 6th etings, on 25, 26 and 27 March; general principles of criminal law, at its 7th 10th meetings, on 28 and 29 March; complementarity, at its 11th to 14th etings, on 1 and 2 April; trigger mechanism, at its 15th to 18th meetings, on and 4 April; and cooperation between the court and national jurisdictions, at s 19th to 23rd meetings, on 8, 9 and 10 April. A summary of the discussions reflected in chapter III of the present report.

During the Committee's consideration of the above questions, delegations t forward various suggestions and proposals, some of which were in written rm. For the purpose of illustrating some of the major issues involved, they re brought together and compiled under the following headings: general inciples of criminal law (A/AC.249/CRP.9); complementarity /AC.249/CRP.9/Add.1); trigger mechanism (A/AC.249/CRP.9/Add.2 and 3); and operation between the court and national jurisdictions (A/AC.249/CRP.9/Add.5) ee annexes II-V to the present report). These compilations were by no means haustive in their inclusion of all suggestions and proposals put forward by e delegations; delegations were encouraged to submit additions to the cretariat for inclusion. The Committee did not discuss these papers and does t wish to prejudge the future positions of delegations.

. With respect to the definition of crimes, a series of Chairman's informal xts was issued in a document (A/AC.249/CRP.9/Add.4) under the following adings: genocide, aggression, war crimes and crimes against humanity (see

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annex I to the present report). The document also included a compilation of proposals and suggestions submitted by delegations. These are also illustrative texts which are not exhaustive and do not necessarily reflect any general views on the debate. The Committee did not discuss the document.

11. The work of the Preparatory Committee during its August session followed the programme suggested by the Bureau. To guide the discussion, the Chairman prepared lists of questions which were formulated in connection with specific articles of the draft statute prepared by the International Law Commission. The main topics considered were: procedural questions, fair trial and rights of the accused at its 33rd to 36th meetings on 15, 16 and 19 August 1996; organizational questions (composition and administration of the Court) at its 37th to 39th meetings, on 20 and 21 August 1996; and the establishment of the Court and its relationship with the United Nations at its 42nd and 43rd meetings, on 26 August 1996. A summary of the discussions is reflected in chapter III of the present report.

12. At the invitation of the Preparatory Committee, the Prosecutor's Office of the International Tribunal for the Former Yugoslavia presented, in an informal meeting, a statement on its work and explanation, which were followed by an exchange of views with the representatives of the Tribunal.

13. During its August session, the following written proposals were submitted:

A/AC.249/L.2	Draft set of rules of procedure and evidence for the Court: working paper submitted by Australia and the Netherlands
A/AC.249/L.3	Draft statute: working paper submitted by France
A/AC.249/L.4	Applicable law and general principles of law: working paper submitted by Canada
A/AC.249/L.5	International cooperation and judicial [mutual] assistance: working paper submitted by South Africa and Lesotho
A/AC.249/L.6	Rules of procedure: working paper submitted by Argentina
A/AC.249/L.7	Tentative draft on procedure: working paper submitted by Japan
A/AC.249/L.8	Proposals on the organization of the Court: working paper submitted by Japan
A/AC.249/WP.1	Proposal submitted by Germany for article 26
A/AC.249/WP.2	Proposal submitted by Singapore for articles 26, 27, 29 and 33
A/AC.249/WP.3	Proposal submitted by Switzerland for articles 34 and 36
A/AC.249/WP.4	Proposal submitted by Switzerland for articles 9 and 26 to 29
A/AC.249/WP.5	Proposal submitted by the United States of America on general principles of criminal law

A/AC.249/WP.6	Proposal submitted by the Netherlands for articles 5, 27, 37, 38, 44 and 48
A/AC.249/WP.7	Proposal submitted by Singapore for article 38
A/AC.249/WP.8	Proposal submitted by New Zealand for article 41
A/AC.249/WP.9	Proposal submitted by Switzerland for article 37
A/AC.249/WP.10	Proposal submitted by Austria for articles 26 to 29, 34, 36 and 51
A/AC.249/WP.11	Proposal submitted by Egypt for article 43
A/AC.249/WP.12	Proposal submitted by Denmark, Finland, Malawi, New Zealand, Nigeria, Norway and Sweden for articles 6(5) and 12
A/AC.249/WP.13	Proposal submitted by Singapore for articles 45 and 48
A/AC.249/WP.14	Proposal submitted by Japan on international cooperation and judicial assistance
A/AC.249/WP.15	Proposal submitted by the United States for part 7
A/AC.249/WP.16	Proposal submitted by Argentina and Canada for articles 38, 38 bis, 41 and 43
A/AC.249/WP.17	Proposal submitted by the United Kingdom of Great Britain and Northern Ireland for articles 5, 6, 9 and 12
A/AC.249/WP.18	Proposal submitted by Austria for articles 9 and 11
A/AC.249/WP.19	Proposal submitted by Denmark for article 6
A/AC.249/WP.20	Proposal submitted by Portugal for article 6
A/AC.249/WP.21	Proposal submitted by Canada for article 45
A/AC.249/WP.22	Proposal submitted by the United States for article 6
A/AC.249/WP.23	Proposal submitted by the United Kingdom for article 6
A/AC.249/WP.24	Proposal submitted by Singapore for article 6
A/AC.249/WP.25	Proposal submitted by China for article 6(3), (5) and (6)
A/AC.249/WP.26	Proposal submitted by Japan for articles 6 and 13
A/AC.249/WP.27	Proposal submitted by Switzerland for articles 6, 8 and 9
A/AC.249/WP.28	Proposal submitted by Austria for article 9

A/AC.249/WP.29	Proposal submitted by Singapore and Trinidad and Tobago for article 6
A/AC.249/WP.30	Proposal submitted by Finland for articles 6, 12 and 19
A/AC.249/WP.31	Proposal submitted by Italy for article 37
A/AC.249/WP.32	Proposal submitted by Singapore for articles 8 to 10, 12, and 13
A/AC.249/WP.33	Proposal submitted by Japan for article 59
A/AC.249/WP.34	Proposal submitted by the United States for articles 8 to 10 and 13
A/AC.249/WP.35	Proposal submitted by Singapore for article 47(2)
A/AC.249/WP.36	Proposal submitted by Israel for article 53(2)
A/AC.249/WP.37	Proposal submitted by Germany for article 44(a)
A/AC.249/WP.38	Proposal submitted by the United Kingdom for article 6
A/AC.249/WP.39	Proposal submitted by the United States for articles 2 and 4
A/AC.249/WP.40	Proposal submitted by Singapore on additions to the compilation of proposals on judicial cooperation and enforcement
A/AC.249/WP.41	Proposal submitted by the United States on offences against the integrity of the Court
A/AC.249/WP.42	Proposal submitted by Israel for articles 10(2), 11(2) and (3) and 16(1)
A/AC.249/WP.43	Proposal submitted by Algeria, Egypt, Jordan, Kuwait, the Libyan Arab Jamahiriya and Qatar on the organization of the Court
A/AC.249/WP.44	Proposal submitted by Algeria, Egypt, Jordan, Kuwait, the Libyan Arab Jamahiriya and Qatar for article 47
A/AC.249/WP.45	Proposal submitted by Finland for articles 28 and 29
A/AC.249/WP.46	Proposal submitted by the Netherlands for article 47
A/AC.249/WP.47	Proposal submitted by Trinidad and Tobago for article 6
A/AC.249/WP.48	Proposal submitted by Japan on the definition of war crimes
A/AC.249/WP.49	Proposal submitted by New Zealand for article 2 bis
A/AC.249/WP.50	Proposal submitted by Denmark for article 20

A/AC.249/WP.51 Proposal submitted by Singapore for article 23

A/AC.249/WP.52 Proposal submitted by Belize for article 20

14. For the purpose of organizing the proposals in a coherent and manageable manner, interested States were encouraged to conduct consultations. For those purposes informal groups were formed on the following subjects: procedural questions (chaired by Ms. Silvia A. Fernández de Gurmendi, Argentina); international cooperation and judicial assistance (chaired by Mr. Pieter Kruger, South Africa); organizational questions (chaired by Ms. Zaitun Zawiyah Bt. Puteh and Mr. Kian Kheong Wong, Malaysia); and penalties (chaired by Mr. Rolf Einar Fife, Norway). The informal group on the general principles of criminal law continued its work (chaired by Mr. Per Saland).

15. At the 45th meeting, on 27 August 1996, the chairmen of the respective informal groups reported on the outcome of their work.

16. At the same meeting, the Committee decided to incorporate into its report, together with the draft articles prepared by the International Law Commission, the compilations of proposals produced by the informal groups, namely, procedural questions, fair trial and rights of the accused (A/AC.249/CRP.14); international cooperation and judicial assistance (A/AC.249/CRP.17); organization, composition and administration of the Court (A/AC.249/CRP.11); general principles of criminal law (A/AC.249/CRP.13); and penalties (A/AC.249/CRP.13/Add.1). The incorporation into the report of the above-mentioned compilations was done on the understanding that they did not represent texts agreed upon among delegations, nor did they necessarily represent the final position of the delegations which submitted such proposals. The compilations were not exhaustive and the proposals therein contained had not necessarily been discussed in the informal groups.

A/AC.249/L.10/Corr.1
29 August 1996

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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Jun YOSHIDA (Japan)

II. ORGANIZATION AND METHOD OF WORK

Corrigendum

1. Paragraph 16

The penultimate sentence should read

> The incorporation into the report of the above-mentioned compilations was done on the understanding that they did not represent texts agreed upon among delegations; they did not affect the status of national proposals nor did they necessarily represent the final position of the delegations that submitted such proposals.

2. Add a new paragraph at the end of the document as follows:

> 17. A view was expressed that only the informal groups on general principles and on international cooperation had had the desirable degree of wide participation. Concern was expressed that in topics such as procedural questions, the compilation of texts on an article-by-article basis might lead to a loss of coherence in the national proposals involved.

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OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Yun YOSHIDA (Japan)

Chapter III

A. Establishment of the Court and the relationship between the Court and the United Nations

1. The issues on which the debate focused were the following: status and nature of the Court and method of its establishment; relationship between the Court and the United Nations; and financing of the Court.

1. Status and nature of the Court and method of its establishment

2. There was general support for the view that the Court should be an independent judicial institution. While some favoured an autonomous, independent body, others preferred that the Court form part of the United Nations as, for example, a principal or subsidiary organ. It was noted in this regard that the status would be determined or affected by the method of creation selected (for instance, the International Tribunal for the Former Yugoslavia was established as a subsidiary organ under Security Council resolutions 808 (1993) and 827 (1993)).

3. It was suggested that the Court should be a full-time, permanent institution, which would sit on a continuous basis for the purpose of prosecuting individuals accused of committing serious crimes. In their view, this would promote stability and uniformity in jurisprudence and continuous development of the law. Others, however, favoured a permanent court, which would meet only when a complaint was actually submitted to it, as proposed in article 4 of the International Law Commission draft statute.

4. It was suggested that the Court should possess international legal personality with treaty-making capacity. There was also a suggestion that the Court should be given competence to request advisory opinions from the International Court of Justice. Others pointed out that this would entail legal implications requiring further consideration.

5. It was suggested that the Court could function at least initially as provided for in articles 4 and 5 of the draft statute. The Presidency, the Prosecutor's office and the Registry (and perhaps one judge for the conduct of the investigation and indictment phase) could be of a standing nature, while the Trial or Appeals Chambers would be convened as required. This system was regarded as sufficiently balanced, at least for the initial functioning of the Court, and would not result in needless costs.

6. As concerns the method for establishing the Court, various suggestions were made: an amendment to the Charter of the United Nations making the Court a principal organ of the Organization similar to the International Court of Justice; a resolution adopted by the General Assembly and/or the Security Council; or the conclusion of a multilateral treaty. The first approach was considered ideal, in that it would make the statute an integral part of the Charter with binding effect on all Member States. It was, however, noted that this process would be complex and time-consuming. To set up the Court by a resolution of the General Assembly or of the Security Council as a principal or subsidiary organ thereof was considered efficient, time-saving and feasible pursuant to the advisory opinion of the International Court of Justice of 1954. It was, however, questioned whether a resolution of a recommendatory nature would provide the necessary legal force for the operation of the Court. There was also support for the establishment of the Court under a Security Council resolution. It was, however, pointed out that the Council's competence under the Charter to create ad hoc tribunals in response to a particular situation endangering international peace and security should be distinguished from the current endeavour of creating an International Criminal Court with general powers and competence.

7. To establish the Court by a multilateral treaty, as recommended by the International Law Commission, seemed to enjoy general support, as the treaty could provide the necessary independence and authority for the Court. States would have the choice of becoming parties to the treaty. The treaty could contain the Court's statute and other instruments relevant to its creation and work (e.g. rules of the court, instruments relating to privileges and immunities of the court). In order to promote wider acceptance of the instrument, the General Assembly could adopt a resolution urging States to become parties to the treaty; the treaty itself could also provide for a review or an amendment mechanism and provisions for the settlement of disputes, which could, according to some, serve as an additional means to attract favourable consideration of the Court from States.

8. In order to maintain the treaty as an integral whole, a suggestion was made that the instrument should not permit reservations; others thought that this question might have to be reviewed at a later stage.

9. Different views were expressed on the number of ratifications required to bring the treaty into force, ranging from 25 to 90 ratifications. A relatively high number of ratifications would promote, according to some, the representation of the principal legal systems of the world and the idea of universality of the Court. On the other hand, the advantage of a lower number was that it could permit a relatively early entry into force of the treaty. Still others suggested that a balance should be achieved to avoid too high a number, which could possibly delay the entry into force of the treaty, or too low a number, which would not provide an effective basis for the Court. Some stressed, however, that early establishment of the Court be given more weight than the other considerations, and that a low number of ratifications would not necessarily preclude the requirement of geographical representation and representation of the major legal systems.

2. Relationship between the Court and the United Nations

10. A close relationship between the Court and the United Nations was considered essential and a necessary link to the universality and standing of the Court, though such a relationship should in no way jeopardize the independence of the Court. A special agreement, either elaborated simultaneously with the statute (as an annex thereto) or at a later stage, to be concluded between the two institutions would be appropriate for the establishment of such a relationship. The agreement should, however, be approved by the States parties to the statute. In this regard, references were made to the United Nations agreement with the International Tribunal for the Law of the Sea.

11. It was further suggested that the general principles and substantive questions (for example, the relationship of the Court with the Security Council) should be dealt in the statute itself. The relationship agreement should deal only with such technical questions of an administrative nature as issues of representation, exchange of information and documentation, or provisions on cooperation between the two organizations. The agreement should be guided by and not be inconsistent with the provisions of the statute.

12. A view was expressed that the Court could have a status analogous to that of a specialized agency. Articles 57 and 63 of the Charter concerning the status of specialized agencies and their cooperation with the United Nations would be relevant in such a case. Others questioned whether such a relationship would be appropriate for the envisaged status of the Court; further careful consideration would be required.

3. Financing of the Court

13. As regards the financing of the Court, a view was expressed that it should be effected from the regular budget of the United Nations as is the case with human rights monitoring bodies, since the Court would be dealing with international concerns, and that its financing should be certain and continuing. Moreover, if States parties were required to finance the Court, some States might be deterred from bringing cases before the Court owing to their financial

situation, or the State in question might not be a party to the treaty. However, another view considered that the independence of the Court required States parties to finance it through their own contributions on the basis of the scale of assessments of the United Nations. It was also noted that States initiating cases, interested States or even the Security Council (if it had referred a case to the Court) could contribute to the financing. The examples of the Universal Postal Union and the Permanent Court of Arbitration were mentioned in this respect. In addition, the Court should also be open to voluntary contributions by States, organizations or even individuals and corporations. Reference was also made to a proposal for the establishment of a fund to be financed by voluntary contributions, as well as collected fines and confiscated assets. As concerns the institutional aspects of financing, it was suggested that a general assembly of the States parties could be held annually to consider administrative and financial issues and approve the budget. There was also a view that the consideration of the question of financing was premature at this stage and should be considered later, after the structure and jurisdiction of the Court had been further clarified. It was suggested that a feasibility study be done so that all possible financing options could be considered. It was pointed out that the Secretary-General had prepared in 1995 certain preliminary estimates concerning the establishment of the Court (A/AC.244/L.2).

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OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Yun YOSHIDA (Japan)

Chapter III

B. Organizational questions (composition and administration of the Court)

Article 5. Organs of the Court

1. With regard to article 5 dealing with organs of the Court, the view was expressed that an indictment chamber for pre-trial procedures should be added, and that it should be composed of three judges with the necessary authority to carry out preliminary investigative matters. Another suggestion was made that there should be no rotation of judges between the various chambers so as to avoid the possibility of having any judge sit on the same case more than once.

2. A proposal was made to create special chambers to deal with certain cases, for example, genocide.

Article 6. Qualification and election of judges

3. It was stressed that the qualification of judges to the International Criminal Court was an issue that needed to be given careful consideration, taking into account the prominence and importance of the future Court. In addition to the qualifications already mentioned in the International Law Commission draft article, it was pointed out that the persons to be elected should also possess experience in humanitarian law and the law of human rights. Other attributes should include high moral character, impartiality, personal integrity and independence. The view was expressed that the reference to "criminal trial experience" should be clearly defined. Doubts were expressed as

to the advisability of establishing for the Court's composition a strict separation between judges with criminal trial experience and those with recognized competence in international law, as this might unduly complicate the election process. Persons competent in both areas were considered ideally suited for such positions.

4. It was pointed out that since the Court to be established should be universal in character, representing all systems of the world, there was the need for balance and diversity in its composition. It was therefore considered important that judges be elected on the basis of equitable geographical representation. In this connection, the formulation of the relevant rule of tne statute of the International Tribunal for the Law of the Sea was recalled. It was also emphasized that the Court's composition should ensure gender balance, particularly in the light of the fact that some of the crimes to be considered by the Court related to sexual assault of women and crimes against children. However, the view was also expressed that there should be no quota system for female judges, nor quotas of any kind, since the sole criteria should be the high qualification and experience of the candidate. It was suggested that rules on qualification and election of judges should be more closely modelled on those governing the International Tribunal for the Former Yugoslavia.

5. In order to attract the most qualified persons, the view was expressed that nomination of candidates for election to the Court should not be confined only to nationals of States parties; nationals of non-States parties should also be permitted. Another view was expressed in this connection that restricting nominations to nationals of States parties would act as an incentive for States to consider becoming parties to the convention. In order to ensure that merit would be a paramount consideration in the election of judges, suggestions were made to the effect that candidates should be nominated either by a nomination committee or by national groups, as in the nomination of candidates for the International Court of Justice.

6. Support was expressed for the idea that the election of judges should be carried out by the States parties to the Court's statute. It was however suggested that elections should be conducted either by the General Assembly, or by the Assembly together with the Security Council, as in the case of the International Court of Justice. According to another point of view, this matter was dependent on the kind of relationship the Court would have with the United Nations.

7. While there was broad support for the idea that the Court should be composed of 18 judges, the view was also expressed that a higher number, for example, 21 or 24, should be considered, depending on the number of Trial Chambers to be created. The view was also expressed that a smaller number should be considered, for example, 15 or even 12, particularly at the beginning, and in order to cut costs. As a cost-saving device, it was also suggested that consideration should also be given to the possibility of electing part-time judges who could be called upon on short notice whenever the need arose. The view was also stressed in this connection that consideration of cost savings should not be a major determining factor in the size or nature of the Court to be created.

8. As for the term of office, while there was general agreement over the proposal of the International Law Commission for a non-renewable nine-year term in order to promote the impartiality and independence of the judges, the view was also expressed that a shorter renewable term (e.g., five or six years) be given serious consideration, in order to ensure geographic rotation and to attract the best qualified persons.

9. A proposal was made that judges should be subject to a retirement age (e.g., at 70 or 75 years). It was also observed that, in such a case, it would be desirable to set an age ceiling for persons being nominated to stand as candidates to the Court.

Article 8. The Presidency

10. It was suggested that the President's duties be limited to ceremonial and administrative functions, and that States parties retain an oversight function over the administrative matters of the Court. It was stated that the line of authority between the President and the Vice-Presidents should be clarified, as well as how decisions are taken within the Presidency (e.g., by consensus, by majority vote). The suggestion was made that the responsibility of the Presidency for the due administration of the Court should include supervision and direction of the Registrar and staff of the Registry, and security arrangements for the defendants, witnesses and the Court. It was also suggested that the functions of the Presidency could be extended to issues such as reviewing decisions of the Prosecutor not to pursue a case. Doubts were, however, expressed as to the appropriateness of the Presidency exercising pre-trial and other procedural functions. In this regard, the establishment of an indictment and/or investigations chamber was suggested.

Article 9. Chambers

11. It was proposed that paragraph 1 of article 9 be clarified, particularly regarding the criteria on the basis of which the Appeals Chamber would be established. A body of opinion favoured a completely separate and independent appellate function and was against the rotation of judges between the Trial Chambers and the Appeals Chamber. It was further proposed that the Appeals Chamber, as well as the Trial Chambers, be elected by the Court rather than appointed by the Presidency, as it was felt that this would enhance the objectivity of the Chambers. The need was also stressed for a mechanism to ensure that there would be a sufficient number of judges with criminal law experience in the Appeals Chamber. The suggestion was also made that pre-trial or indictment chambers should be constituted. It was noted in this connection that they could be permanent or established for a particular case or for a specific time period.

Article 10. Independence of the judges

12. It was pointed out that there were a number of ways to enhance the independence of the judges, such as the election procedure, length of terms,

security of tenure and appropriate remuneration. The view was held that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were considered compatible with such functions. It was suggested that any question arising in connection with the judges' outside activities should be decided not by the Presidency but by an absolute majority of the Court, a solution that was in line with article 16 of the Statute of the International Court of Justice.

Article 11. Excusing and disqualification of judges

13. The importance of the question concerning the excusing and disqualification of judges was stressed. It was suggested that the relevant article of the International Law Commission draft statute needed further elaboration in this respect. A suggestion was made to the effect that the terms of disqualification of a judge contemplated in paragraph 2 of article 11 should not extend to members of an indictment chamber having acted in this capacity. It was also suggested to include in the statute such specific grounds for the excusing and disqualification of judges as: that the judge is the injured party or a relative of the accused or of the injured party, or a national of a complainant State or of a State of which the accused is a national, or that the judge has acted as a witness, representative, counsel, public prosecutor or judge at the national level in the case involving the accused. Some of the above suggestions for inclusion gave rise, however, to reservations. The proposal was made that States parties should be able to raise questions concerning the disqualification of a judge. It was also suggested that more detailed rules should be developed to govern conflict of interest problems.

Article 12. The Procuracy

14. The view was expressed that the statute should provide for an independent Prosecutor with experience in criminal investigations in order to ensure the credibility and integrity of the Court, and that it might be useful to look at the experience of the tribunals for the former Yugoslavia and Rwanda. It was further stated that the Prosecutor's office should be established to seek the truth rather than merely seek a conviction in a partisan manner. As to the provision concerning the election of the Prosecutor and Deputy Prosecutor, the view was expressed that further elaboration was required. The view was also expressed that the Prosecutor, like judges, should not be allowed to seek re-election, in order to avoid any political overtones associated with a re-election process. It was observed that the rules for disqualification of the Prosecutor needed further elaboration. It was suggested in that connection that he or she should not engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence (e.g., being a member of the legislative or executive branches of the Government of a State). It was also suggested that the Prosecutor should not act in relation to a complaint initiated by his or her State of nationality or involving a person of his or her own nationality or in any case in which he or she had previously been involved in any capacity. There were differing views on the need for disqualification based on nationality issues. It was also

suggested that the grounds for disqualification of the Prosecutor should be similar to those for a judge. It was suggested that the term "Procuracy" was inappropriate and should be replaced by such designation as "the Office of the Prosecution".

Article 13. The Registry

15. It was suggested that there be included in the statute guidance on the qualifications for the Registrar and Deputy Registrar, in order to ensure that such office would be vested in highly qualified persons. It was also suggested that the Registry be under the direction of the Presidency or of the Court. The view was expressed that the functions of the Registrar needed elaboration, and in this regard reference was made to the wording in article 17, paragraph 1, of the statute of the International Tribunal for the Former Yugoslavia.

Article 15. Loss of office

16. The view was expressed that grounds for the removal of judges, the Prosecutor and Deputy Prosecutor should be clearly stated in article 15. It was suggested that further to the grounds contemplated in the International Law Commission draft statute, reference should also be made to the engagement in delinquency, whether officially or privately, which could erode public confidence in the Court. The view was also expressed that a distinction should be made between conduct triggering loss of office and other kinds of conduct deserving less serious disciplinary measures.

Article 16. Privileges and immunities

17. The view was expressed that the privileges and immunities as expressed in the article were too broad and should be limited to official functions. Moreover, the privileges and immunities of the Court's staff should be waivable. A view was expressed that on-site functions of the Prosecutor in a State's territory were different functions than those performed by a diplomatic agent and that, therefore, the Prosecutor did not need full diplomatic privileges and immunities. The point was also made that the scope of the privileges and immunities should be reformulated later after the functions of each body of the Court were well defined.

Article 19. Rules of the Court

18. It was suggested that the rules of the Court should be formulated on the basis of the principles set out in the statute and could initially be reviewed by the States parties. Subsequently, the judges could adopt supplementary rules in accordance with the rules of the Court. The view was expressed that, in the light of the experience of the International Tribunal for the Former Yugoslavia, which had amended its rules nine times, a flexible procedure for amendment of the rules of the Court should be established.

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OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Jun YOSHIDA (Japan)

III. FURTHER DISCUSSION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

C. Scope of jurisdiction of the Court and definition of crimes

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 12 to 75, dealing with "Scope of jurisdiction of the Court and definition of crimes", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1), as well as additional proposals contained in document A/AC.249/L.20.

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DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Jun YOSHIDA (Japan)

III. FURTHER DISCUSSION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

D. Trigger mechanism

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 133 to 168, dealing with "Trigger mechanism", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1).

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Rapporteur: Mr. Yun YOSHIDA (Japan)

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E. Procedural questions, fair trial and rights of the accused

The Preparatory Committee considered this topic at its session in August 1996.

To facilitate and guide the discussion, the Chairman put forward a list of questions formulated in the context of certain specific articles of the draft statute prepared by the International Law Commission.

There was general agreement on the importance of this topic and the need to elaborate further the relevant provisions. Different views were expressed as to how best to meet this need. One view was that all the necessary principles and rules should be formulated in an integral manner, contained in the statute or annexes thereto, and adopted by the States parties. Another view was that the Statute itself should contain only the general principles, leaving the implementation and subsidiary rules to be embodied in a second or third instrument; while these instruments could all be adopted initially by the States

parties, the second and third instruments could be amended as needed by a simpler procedure (e.g. by the Court itself) without resorting to treating amendment provisions. Still, another view was to assemble at this stage those principles and rules deemed relevant and to leave the question of their placements for a later stage. The view was also expressed that it would not be practical to prepare all necessary rules down to every detail and that the Court must be given the flexibility to add detailed rules, provided that they would be consistent with the principles and rules laid down by the States parties.

A view was expressed that the procedural rules should maintain a balance between different penal systems of States and draw from their positive elements. Reference in that context was made to the penal law approach adopted by civil law States in matters dealing with hearings and investigation. These steps are taken to try to equalize the prosecutor and defence in terms of the means available to them. The judge, too, plays a more active role in conducting hearings. In that context, it was stressed that an international criminal jurisdiction should draw from the practice of any system that could assist it in the performance of its function. It should not be used as a standard to test the credibility of penal systems of individual States.

PART 4. INVESTIGATION AND PROSECUTION

Article 25. Complaint

It was noted that the complaint should contain information sufficient to indicate that investigation by the Court was warranted; it should meet a certain threshold in indicating that a crime had been committed that was within the jurisdiction of the Court and as to which the Court's exercise of jurisdiction was appropriate. The complaint should, further, address the issue of consent by a certain number of States, admissibility or complementarity. This would assist the Court in determining whether it should take action in a particular case. It was, further, stressed that the purpose of the complaint should be to describe criminal acts which appeared to warrant investigation by the Court.

In this context, it was noted that, as a minimum, a complaint should contain information on: (a) the jurisdiction relied upon in making the complaint; (b) the circumstances of the alleged crime (e.g. specific criminal conduct occurring in a specific place and during a specific time); (c) the identity and whereabouts of any suspects, if known; (d) the identity and whereabouts of any witnesses, if known; (e) the location of evidence; and (f) details of any investigation carried out by the complaining State party or, to its knowledge, any other State.

Concerns, however, were expressed about stipulating a mandatory list of requirements for a complaint, because such a list might make it more difficult for States with fewer resources to lodge a bona fide complaint. For that reason, some support was expressed for the words "as far as possible" in paragraph 3 of article 25, for they allowed a degree of flexibility.

As regards the wording of paragraph 3 of article 25, it was, according to one view, sufficient for the statute; more detailed rules specified in the preceding paragraphs could be placed in a second tier instrument. According to another view, the paragraph needed detailed elaboration of the rules of procedure.

As regards the role of the Prosecutor, the following points were made: (a) the Prosecutor should be able to ask for clarifications of a complaint; (b) the prosecutor should not be bound by allegations in the complaint about who is or should be a suspect or accused; (c) the Prosecutor should be able to pursue criminal acts that are closely related to those in the complaint or which form a continuing pattern of criminal activity; but (d) if the complaint is to serve as a trigger, the investigation should not stray into unrelated or clearly collateral matters. Views differed as to whether the prosecutor was bound by the content of complaint, or whether the prosecutor's investigation may extend beyond the content of a complaint. One view supported the former, while another expressed preference for the latter. There were uncertainties as to whether a complaint by a State should be too specific or should only refer, as in the case of a referral by the Security Council, a situation to the Court.

[With respect to who can make a complaint, three different views were expressed. According to one view, only States parties should be empowered to lodge a complaint. According to another view, States parties and the Security

Council should be able to lodge a complaint. According to yet a third view, the prosecutor should be allowed to initiate investigation based on any credible information provided to him or her, a model similar to that provided for in the Statute of the International Criminal Tribunal for the Former Yugoslavia.]

The dual complaint system under article 25, one for genocide and the other for other crimes, was considered by some as undesirable. Preference was expressed for a single, unified system, applicable to all crimes.

It was suggested that the question of triggering mechanism be addressed in two separate articles, one dealing with complaints by States and the other with complaints by the Security Council. This would permit prescribing whatever special requirements would be needed for referral of situations to the Court by the Security Council under Chapter VII of the Charter.

Article 26. Investigation of alleged crimes

As regards the initiation of investigations, there were various suggestions for providing a minimum threshold, a screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous or vexatious complaints. It was suggested that a State party, or a person referred to by name in a complaint, should be allowed to challenge before a trial chamber the submission of a complaint prior to the initiation of an investigation, on various grounds (e.g., the sufficiency of the complaint, the basis for jurisdiction and the admissibility of the case in terms of the principle of complementarity and the gravity of the alleged crime). A State party which was conducting a related investigation should also be allowed to send its objections to the Prosecutor.

There were different views as to whether the Prosecutor should be authorized to initiate investigations ex officio. It was suggested that the Prosecutor should be authorized to do so based on sufficient, verifiable information received from any reliable source to strengthen the independence of the Prosecutor and the effectiveness of the Court.

With respect to the role of the Prosecutor, a spectrum of views were expressed: the Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interests of justice; he should seek the cooperation of States in conducting investigations rather than carrying out such activities directly for reasons of efficiency and effectiveness, and the investigations would be conducted in accordance with the statute and the rules of the court as well as the national law of the State in whose territory the investigation was conducted; the Prosecutor should be able to seek cooperation directly from States or could be authorized to conduct direct investigations in exceptional situations in which there were concerns regarding the objectivity of the national authorities.

With regard to on-site investigations, different ways to conduct such activities were mentioned: these investigations should only be conducted with

the consent of the State concerned to ensure respect for its sovereignty with the possible exception of situations in which the national criminal justice system was not fully functioning; the Presidency could empower the Prosecutor to conduct such investigations if there were no civil authorities to whom a request for assistance could be transmitted; the Presidency should appoint a judge or a chamber to supervise on-site investigations and thereby protect the rights of the suspect or accused whose counsel could also be present.

There was some question as to whether the Presidency was the appropriate body to issue investigative orders, with questions being raised as to the legal effect of such orders. It was stated that the reference to orders concerning "provisional arrest" in this context could create confusion with the use of this term in relation to extradition. It was suggested that an investigation chamber should monitor the investigative activities of the Prosecutor to give judicial authority to these activities, to decide on requests for State cooperation, to ensure equality between the prosecution as well as the defence and to enable the suspect to use the resources of the Court. This chamber could also decide on objections of States to decisions on investigative measures prior to an indictment. There was, however, the view that such tasks could be entrusted to a single judge or magistrate rather than creating an additional chamber.

Attention was drawn to the need to further consider and clarify the standard to be applied by the Prosecutor in deciding whether to initiate an investigation or to file an indictment. It was suggested that the Prosecutor should, for example, have broad discretion to decide not to initiate or to discontinue an investigation or prosecution in the interests of justice due to the age or illness of an individual or a national investigation or prosecution, or to have the authority to decline to investigate or to prosecute certain cases which were not of sufficient gravity and to select the most important cases when crimes were committed on a massive scale.

The view was expressed that the complainant State or the Security Council, as appropriate, should be informed of the Prosecutor's decision not to initiate an investigation or to seek an indictment. Any State whose cooperation had been requested during an investigation should also be informed of the latter decision. There were various suggestions to provide for the judicial review of these decisions by the Presidency, a trial chamber, an investigation chamber, or a judge at the request of the complainant State, the Security Council or the victims. There was some question as to whether the complainant State or an appropriate judicial body should be entitled to initiate a review of such a decision and the manner in which the complainant State should submit its views. It was suggested, for example, that the judicial review should be based on a specific legal standard, such as manifestly inappropriate, which would defer to the appropriate exercise of prosecutorial discretion; that the authority of the judicial body should be limited to requesting the Prosecutor to reconsider a decision to preserve prosecutorial discretion and independence; and that the Prosecutor should be able to reconsider such decisions based on new information.

As regards the rights of the suspect, the view was expressed that these rights should be further elaborated in accordance with international standards and contained in a separate article. Emphasis was placed, inter alia, on the

right of the suspect to receive a sufficient warning before being questioned, to remain silent during questioning, to not be compelled to testify or to confess guilt, to receive the assistance of competent counsel irrespective of the ability to pay for such assistance and to equal protection before the law. The view was expressed that the enumeration of the rights of the suspect should, however, be non-exhaustive.

Article 27. Commencement of prosecution

It was suggested that the indictment filed by the Prosecutor in a particular case should contain more detailed information than that stipulated in paragraph 1 of the article. However, if the evidence collected in the case was excessive, then a summary could be provided to the reviewing body, which would have the right to request further information as needed.

As regards the reviewing body, concerns were expressed over the concentration of authority vested with the Presidency as envisaged in the draft statute, and it was suggested that it would be more appropriate to give certain pre-trial responsibilities to another body, independent of the Prosecutor and the trial and appellate chambers. In this connection, it was proposed that a pre-trial or investigations chamber be established to examine the indictment and to hold confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes. The point was made that a permanent reviewing chamber would have the advantages of consistency of approach and avoidance of difficulties associated with a rotation of judges.

It was also suggested that either a single judge or a panel of three judges, serving on a rotational basis, should have the function of ruling on pre-trial matters. The same judge performing pre-trial functions should not, however, be involved with the case at later stages. In addition, the judges of the reviewing body should not be of the same nationality as the accused.

Regarding the standard on which the indictment would be based, the statement was made that whatever standard was ultimately employed should be sufficiently high to justify trial proceedings. It was suggested that the timing of the exercises contained in paragraph 2 (a) and (b), i.e., determination of a prima facie case and the admissibility of a case before the Court, should be clearly delineated.

There was the view that the statute should address the Court's ability to issue arrest warrants prior to any confirmation of an indictment, as well as the need to maintain the confidentiality of an indictment until the arrest is made, in order to ensure custody of the suspect and to prevent destruction of evidence. It was further proposed, as is also provided for in rule 61 of the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia, that provision be made in the statute that would allow for seizure of the accused's assets under certain circumstances.

With respect to paragraph 3, it was proposed that the reviewing body should indicate the reasons in those cases where it refused to confirm the indictment.

As regards the requirements under paragraph 4, it was pointed out that any amendments to the indictment should not result in the charging of new crimes against the accused. Moreover, the requirement of notifying the accused of any amendments should be done promptly and in the language of the accused, in accordance with the International Covenant on Civil and Political Rights (article 14, para. 3 (a)).

Article 28. Arrest

Article 29. Pre-trial detention or release

Article 30. Notification of the indictment

It was stressed that there were matters within the purview of the State and those within the purview of the Court and only those functions performed by the Court should be regulated by the statute. It was recognized that State cooperation with the Court was essential for the carrying out of effective and efficient arrest and detention procedures. Attention was also drawn to proposals, submitted at the first session of the Preparatory Committee, for the reformulation of articles 28 and 29 which would provide for more clarification and concise wording regarding arrest and detention.

As regards the arrest of the suspect, the view was expressed that the proceedings under article 28 should be conducted under the control of the relevant national authority. Moreover, since many countries would not accept the direct execution of an arrest warrant on their territories, the statute should provide that States should execute the warrant on behalf of the Court.

It was suggested that the term "provisional arrest" used in article 28 be replaced by another term to avoid improper analogizing to the extradition model.

Holding the suspect for a period of 90 days to allow time for confirmation of the indictment was deemed reasonable considering the serious nature of the crimes in question and the complicated investigation that would ensue. On the other hand, the view was also expressed that the 90-day period was too long and should be reduced. It was also suggested that once the Presidency was satisfied that there was no prospect that the required arrest criteria would be met, the suspect should immediately be released. Concern was also expressed over the provision contained in paragraph 2 of article 28 allowing the Presidency to extend the 90-day period to a seemingly indefinite period of time, and in this regard, the suggestion was made to have a fixed period. Provision also could be made for an extension based on compelling reasons.

It was felt that article 29 on pre-trial detention or release needed further clarification in respect, inter alia, of the determination by the judicial officer of the warrant duly served and the purpose of such determination. It was suggested that the determination of the lawfulness of the arrest or detention, as well as bail, should be made by the relevant national authorities. However, the statute should provide guidelines for the grounds for detention and release for those occasions when the Court has custody of the suspect.

It was proposed that, in accordance with the International Covenant on Civil and Political Rights, detention of a suspect before trial should be limited to exceptional cases, such as danger of flight of the suspect, threat to others or the likelihood of destruction of evidence. It was also suggested that provision should be made for other options, such as allowing the custodial State to guarantee the availability of the suspect before the Court without actually detaining the suspect, or house arrest.

It was considered useful to make clear in the provision on notification of the indictment, as contained in article 30, that State authorities should normally make service of documents. It would not be cost-effective or necessary for reasons of fairness for the Registrar of the Court to travel to each country where the suspect was detained to serve the indictment.

PART 5. THE TRIAL

Article 34. Challenges to jurisdiction

Article 35. Issues of admissibility

Article 36. Procedure under articles 34 and 35

As a general comment, it was noted that the provisions dealing with the organization of the trial should be more detailed than those provided for in the draft articles formulated by the International Law Commission. Such provisions should, in addition to providing for a speedy and fair trial, also provide for the following: the protection of witnesses; the right of the victim to reparation; the possibility of trial in places other than the site of the Court; the possibility of trial in absentia, if the accused is a fugitive; confidentiality of information and evidence; and suppression of false evidence.

The discussion on articles 34, 35 and 36 was focused on three main questions and it showed that further elaboration and clarification were requested.

As regards the question of who may challenge the jurisdiction of the Court or object to the admissibility of the case (article 34), it was noted that the term "interested State" was too vague and should be defined as those States entitled to exercise jurisdiction, including the State of nationality of the accused, the State where the crime was committed, the State of nationality of the victims and the custodial State. According to one view, such interested States should also be parties to the statute. According to another view, there was no logical reason to deprive a non-State party that had a direct and material interest in the case from challenging the Court's jurisdiction. Thus according to this view, any State that had a right to consent to the Court's jurisdiction under the statute should be able to challenge that jurisdiction. It was also pointed out that the accused should have the right to challenge the jurisdiction of the Court. The question, however, was raised as to whether the accused should be permitted to challenge jurisdiction on grounds of lack of consent where the State whose consent was required had not?

As regards the question of when such a challenge may be made (article 35), a preference was expressed for as early a time as possible. It was suggested that the right to challenge jurisdiction or admissibility be limited to pre-trial hearings or to the commencement of the trial. To avoid any misuse of the Court or unnecessary expenditure, it was suggested that any challenge to jurisdiction or admissibility should be raised and decided upon before any step in the trial was taken. In addition, challenges to jurisdiction should be permitted only once and not at multiple stages of the process. Preference was expressed for limiting the time within which challenges to jurisdiction or admissibility may be made. In this regard it was noted that States with an interest in a case should be given notice of indictment. This could be facilitated by notification of an indictment from the Court to all States parties.

It was stated that only in exceptional cases should challenges to jurisdiction be permitted during the trial. Such exceptional cases would include the discovery of new facts which could affect the question of jurisdiction. It was also noted that a fugitive who is at large should not be permitted to challenge jurisdiction, thereby taking advantage of the processes of the Court, while maintaining the option of refusing to submit to it if it ruled against him or her. The question was also raised as to whether an accused should be permitted to wait until the later stages of trial to raise a jurisdictional challenge that could have been brought much earlier. A view was also expressed that there should be no distinction between the right of the State and the accused in terms of when either could challenge the jurisdiction of the Court. Hence paragraph (b) of article 34 should be deleted. It was further stated that an accused should not be able to challenge admissibility on the grounds of a parallel investigation by national authorities where those national authorities had, in fact, declined to challenge the Court's jurisdiction. These issues involved how best to allocate prosecutorial power between the Court and States in which the accused did not have a proper role.

As regards the question of according to which procedure challenges could be made (article 37), different views were expressed. One view was that objections to jurisdiction should be raised before a chamber other than the Trial Chamber; such a chamber might be the indictment chamber or the investigative chamber. This procedure, it was suggested, was compatible with maintaining the independence of the Trial Chamber. According to another view, the question of objections to jurisdiction should be dealt with by the Trial Chamber itself. It was noted that there should be a decision as to whether decisions on challenges to jurisdiction or admissibility could be appealable. If so, the statute should clearly provide the procedure for such appeals. It was also noted that article 36, paragraph 2, on the referral of a matter to the Appeals Chamber, required further guidance with respect to the prerequisites for such a referral.

It was stated that when an individual has been investigated and/or prosecuted by national authorities, the decision to override that national process should be by a two-thirds majority of the Court, in deference to national process.

Article 37. Trial in the presence of the accused

Different views were expressed on this question. One view was that trial in the presence of the accused constituted a fundamental right of the accused and that this right must be observed. Consequently there could be no trial in absentia.

Another view was that the present context was different; it involved exceptional circumstances (e.g. crimes affecting the international community) and pertained to a special international judiciary organ which would not have an enforcement mechanism to ensure the presence of the accused. There was therefore room to consider trial in absentia at least in certain specific cases. It was, however, stressed that the rights of the accused must be fully guaranteed and the circumstances and conditions clearly stipulated.

Specific comments were made on the text of article 37.

Concerns were expressed over article 37, paragraph 2, which provided for exceptions to the general rule. It was pointed out that even the limited exceptions provided for in that paragraph were not in conformity with the rights of the accused as contained in various international human rights instruments and national constitutions, and should therefore be deleted. It was further commented that the reference to "ill-health" in paragraph 2 (a) constituted only a reason for the adjournment or the suspension of trial and not for a trial in absentia; continuing disruption of the trial by the behaviour of the accused was not a legitimate excuse and it should be remedied by such practical measures as using video conference or creating a security area for the accused, treating such behaviour as contempt of court. As far as trial in absentia for reasons of security was concerned, it was noted that practical alternatives should be sought (e.g. temporary relocation of the court or the use of video conference).

It was also observed that in the case of escape from bail or from lawful custody, the focus for the international community should be on cooperation in locating and re-apprehending the accused. The accused should be warned in advance that in case of escape, he or she could be tried in absentia. It was suggested that the term "lawful custody" needed further clarification. It was pointed out that the distinction between "deliberate absence" referred to in article 37, paragraph 4, and escape "from lawful custody" referred to in paragraph 2 (c) of that article was not clear and should be clarified.

It was stressed that in cases of trial in absentia, the rights of the accused should be set out in detail to include, for example: the possibility for the Court to review the order to exclude the accused, the right of the accused to be informed (through the Registrar) of the proceedings, to be questioned in the presence of his or her counsel and of the Prosecutor or to be always legally represented by a counsel of his or her choice (or appointed ex officio).

Specific comments were also made to paragraph 4, which permitted the establishment of an Indictment Chamber for certain specific purposes in cases of deliberate absence of the accused. Concerns were expressed that the effectiveness of the Court might be undermined in those cases. There was, however, support for such an indictment chamber for the purpose of recording the evidence or issuing and publishing an international warrant or arrest for the accused. This should not, in some members' view, lead to either partial or full trial in absentia. There was the view that trial in absentia may take place when the accused was deliberately absent, or when the accused implicitly or explicitly waived his or her rights, provided that rigorous safeguards should be taken to preserve the rights of the accused. It was also suggested that neither a verdict should be reached nor imprisonment should be imposed in a trial in absentia. In any case, the trial should be reopened at the request of the accused if it had already taken place in absentia. The accused should be able to challenge the admissibility of the evidence recorded in his or her absence. Also, the right of appeal against any decision granted in absentia should be allowed so as to strike a balance between the necessities of justice and the rights of the accused.

Article 38. Functions and powers of the Trial Chamber

There were a number of general remarks: consideration should be given to when the Trial Chamber was constituted and whether pre-trial motions should be dealt with by another entity; the accused should be informed of the composition of the Chamber to facilitate challenges under article 11; some matters addressed in paragraph 1 should be dealt with during the first appearance of the accused before a chamber rather than at the commencement of the trial; and pre-trial motions should be addressed, possibly along the lines of rule 73 of the International Criminal Tribunal for the Former Yugoslavia.

As regards paragraph 1 (d), there were different views as to whether the accused should be allowed to enter a plea of guilty or not guilty and the consequences of a guilty plea. The view was expressed that the accused should be allowed to enter a plea of guilty which would have the procedural effect of obviating the need for a lengthy and costly trial: the accused would be allowed to admit his wrongdoing and accept his sentence; the victims and witnesses would be spared any additional suffering; and the Court would be allowed to take the guilty plea into account in sentencing the convicted person. The accused should also be allowed to enter a plea of not guilty, to benefit from the presumption of innocence and to offer a defence without affecting the duty of the prosecution to prove the charges. A court was not bound to accept a plea or a recommendation for leniency.

In contrast, the view was also expressed that the accused should be able to acknowledge the deeds attributed to him and the Court should be able to consider the admission as evidence; the admission should not be the only evidence considered by the Court; the admission should not have any consequences for the trial procedures; the Chamber had a duty to determine the guilt or innocence of the accused notwithstanding an admission; and a full trial was necessary given the seriousness of the crimes and the interests of the victims as well as the international community. It was suggested that the Court should not have the power to convict the accused based solely on his confession or a single testimony, the Court should be subject to a minimum evidentiary rule concerning admissions or confessions made in Court, and the Court should be subject to a rule of legal reasoning for its decisions concerning guilt and the elements of the indictment, and therefore paragraph 1 (d) should be deleted. It was noted that this paragraph was contrary to the constitutions of some States and could prevent their acceptance of the statute.

Attention was drawn to the need to bridge the gap between different legal systems, some of which did not provide for a plea by the accused with respect to the charges, with emphasis being placed on finding the common denominators in different legal systems. It was suggested that if the accused admitted the facts contained in the indictment, then the Trial Chamber could decide to conduct an abbreviated proceeding to hear a summary of the evidence presented by the prosecution or to continue with the trial if the accused failed to reaffirm the admission or to accept the proceeding. It was further suggested that the Trial Chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence, and whether the admission was supported by the facts contained in the indictment and a summary of the evidence

presented by the prosecution before deciding to request additional evidence, to conduct an expedited proceeding or to proceed with the trial. It was stated that the Court must have the power to satisfy itself before taking a decision.

Paragraph 1 (d) was described as relating to the question of plea bargaining, which should be excluded given the serious nature of the crimes which affected the interests of the international community as a whole. However, it was also stated that guilty pleas were not inseparable from plea bargaining.

Regarding paragraph 2, the view was expressed that the Chamber should play an active role in guiding the trial proceedings and be entrusted with establishing evidence for or against the accused. It was also stated that procedural matters relating to the order of presentation of evidence should be dealt with in the Rules, while protective measures for victims and witnesses should be elaborated in the statute.

As regards paragraph 3, it was suggested that joinder of accused and joinder of crimes should be addressed in the Rules.

With regard to paragraph 4, the view was expressed that the principle of public trials should be clearly stated as the strong preference in the statute and that any exceptions should be very limited. Suggested exceptions to this principle related to public order; the dignity of the proceedings; the security or safety of the accused, victims or witnesses; crimes allegedly committed by minors; and victim or witness testimony concerning sexual violence. Various concerns were expressed regarding the reference to "confidential or sensitive information". The power of the Chamber to maintain order might obviate the need for conducting trials in the absence of a disruptive accused under article 37. The Chamber should also have the power to impose sanctions for failure to respect its orders to provide deterrence, as in rule 77 of the International Criminal Tribunal for the Former Yugoslavia. Decisions concerning in camera proceedings and the verdict should be announced in a public session.

There were a number of remarks concerning paragraph 5: paragraph 5 (b) and (c) should be amended to refer to witnesses who appear before the Court; a new paragraph 5 (c) bis should be added to enable the Chamber to request the assistance of States in taking witness testimony and producing documents or other evidence outside of court; a chamber should rule on the admissibility of evidence under paragraph 5 (d) at an early stage; the Chamber should rule on evidentiary questions only after hearing the parties; and such matters could be addressed in article 44.

Regarding paragraph 6, it was suggested that the Registrar should be required to prepare a complete written record of the proceedings and possibly a video or audiovisual recording as well.

Article 41. Rights of the accused

It was recognized that respect for the rights of the accused were fundamental and reflected the credibility of the Court and that there was

already a large body of international law on the subject, as contained in such instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, standard minimum rules for the treatment of prisoners and the statutes of the Yugoslavia and Rwanda tribunals, which should be elaborated in the statute. An issue which needed to be explored was the interaction of the Court and the national jurisdiction prior to the transfer of an accused to the Court.

It was stated that the important right of the accused to be promptly informed of the charge needed further elaboration in the statute, as well as a broader guarantee than was currently in the draft statute of speedy conduct of all proceedings. The point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings, as well as secure the early release of an innocent person. What was needed in this regard was a pro-active court which would properly manage the case to achieve an early resolution of the case.

It was suggested that the statute should provide for the appointment of counsel if the accused could not afford one. In this connection, a list of defence counsel should be developed to allow the accused a choice of counsel. It was pointed out that the qualification for defence counsel should be based on his or her capacity to practise before the highest criminal court in their respective countries, and, in the case of court-appointed counsel, a panel could be established to review counsel according to such criteria as high moral character, competency and relevant experience. It was recommended that there be a presumption in the statute in favour of the accused being represented by counsel. However, in the event the accused chose to conduct his or her own defence, given the grave crimes the accused would be charged with, consideration could be given to the Court's providing counsel to give legal advice to the accused if so requested. Moreover, provision specifically should be made for the right of confidential communication between the accused and defence counsel.

Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage of the Prosecutor over the defence.

It was stated that also fundamental to a fair trial was a provision for the full disclosure of evidence by the Prosecutor to the defence, as well as a reciprocal duty of disclosure on the part of the defence, including notice to the Prosecutor of any alibi evidence the defence might bring before the Court during trial. It was also stated that the provision, contained in paragraph 2 of the article, requesting the Prosecutor to make available to the defence exculpatory evidence should also include the requirement to make available inculpatory evidence prior to the conclusion of the trial, while others stated that these provisions need further elaboration. It was further stated that the problem of the need to protect sensitive information supplied by a State would have to be balanced with the general duty to disclose.

It was also pointed out that the right to confront and cross-examine all witnesses was a fundamental right, and in this regard concern was expressed over the possible use of anonymous witnesses, since the defence's ability to probe the credibility of the witness to show a motive to lie or to show a mistake was

made depended to a large extent on who the witness was. The view was also expressed that there was a need to take into account special measures for a child witness.

The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony.

Concerning the need for translation of documents, a suggestion was made that the statute should not allow for the translation of all relevant documents if the accused's counsel had command of either of the working languages of the Court. The question of the costs involved in translation of documents was also raised.

Recommendation was made to make provision in the statute for the accused's right to compensation in the event of his conviction being reversed or his being pardoned on the ground of newly discovered evidence.

With respect to specific drafting points, it was suggested, for example, that the words "subject to article 43" contained in paragraph 1 of the article be replaced with "having due regard to article 43" so as not to place the rights contained in article 43 in a superior position over the rights of the accused. It was further suggested that the words "subject to article 37 (2)" contained in paragraph 1 (d) be deleted.

Article 43. Protection of the accused, victims and witnesses

It was pointed out that this article was of a very general nature and should be further elaborated and more precisely formulated. Attention was drawn in this regard to the principles of justice for victims of crimes contained in the 1985 United Nations Declaration on the topic, as well as principles, recently elaborated by an expert group, guaranteeing the rights and interests of victims in the proceedings of the Court. The view was also expressed that the protection of the accused, victims and witnesses should be the obligation of the State concerned. Given the importance of protecting victims and witnesses, it was further recommended that their protection should be addressed in a separate provision from that of protection of the accused. At the same time, the point was made that the statute must contain a balance of rights between the two groups and that any protections bestowed on victims and witnesses should not undermine the rights of the accused to receive a fair trial.

It was stated that measures of protection employed should be non-exhaustive. Reference was made to the witness protection programmes found in many national jurisdictions. It was suggested that provision be made to protect the identity of victims and witnesses in particular cases which, at the same time, would not unduly prejudice the defence. It was further suggested that the Court should obtain the cooperation of the victim or witness before offering any type of protection. The view was also expressed that victims and witnesses should be encouraged to come forward, and in this connection a court should be created that treated these individuals with concern and respect.

Particular concern should be given to children and the mentally impaired and victims of sexual assault. There were also proposals relating to the need to keep victims and witnesses informed of the progress of the case. Attention was drawn to proposals, as well as the precedent of the Yugoslavia Tribunal, for a witness and victim unit to be established to provide services and support to victims and witnesses, under the supervision of the offices of either the Registrar or the Prosecutor.

It was recommended that provision be made in the statute for payment of compensation to victims who have suffered damages. There were several proposals concerning this issue and included the possibility of the Court being empowered to make decisions on these matters, including the administration of a compensation fund, as well as to decide on other types of reparation. It was further proposed that both the victim and the accused should be allowed to take part in such a proceeding. Concern, however, was expressed over the Court's ability to adequately follow through and ensure that restitution was made. The view was also put forward that since the question of compensation was essentially a civil matter, the Court could decide the scope of the victimization and, relying on this judgment, the victim could pursue the matter of remedies through the appropriate national jurisdiction.

With respect to specific drafting points, it was suggested that the words "subject to article 41" be added to article 43.

Article 44. Evidence

The question of whether the rules of evidence should appear in the statute or in the Rules of Procedure of the Court or in some other form was among those raised by this article.

It was noted that the rules of evidence constituted an integral part of the due process of law and of the rights of the accused.

A commonly shared view seemed to be that fundamental or substantive principles of evidence should figure in the statute itself while secondary and subsidiary rules could appear in the Rules of the Court or other instruments. This approach would be more flexible since the latter could be more easily amended than the statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements. Certain examples of such principles were given: the judicial notice, the presumption of innocence of the accused, the capacity of witnesses to testify, the right to refuse to answer incriminating questions or the evaluation of documentary evidence. Written proposals were submitted for that purpose. It was, however, recognized that the task would be difficult since this would first involve a selection of the fundamental principles from the main legal systems of the world, and would then entail the distinction between the principles, rules and subsidiary rules.

The issue of perjury was also in the centre of the debate on this article. One view was that States parties should extend their national laws of perjury to cover evidence given by their nationals before the Court. The Court should only

be concerned with whether perjury had taken place; the consequences of perjury should be left to the States concerned.

Another view was that the Court should be able to control its proceedings, address the reliability of evidence presented, and impose penalties in case of perjury; to leave such issues to States would entail many legal and practical difficulties, lengthy proceedings and jurisdictional conflicts. Rules concerning perjury should therefore be included in the statute.

Another issue related to the means of obtaining evidence and the exclusion of evidence (paragraph 5 of article 44). This raised, inter alia, the important question of judicial cooperation between the Court and national jurisdictions since very often evidence presented to the Court was obtained in the States concerned, in accordance with their national rules. The possibility for the Court to inquire whether such evidence had been obtained in accordance with national rules or not was discussed. It was suggested that there should be created a mechanism by which the Court, in cases of allegations of evidence obtained by national authorities by illegal means, could decide on the credibility of the allegations and the seriousness of "violations". The view was expressed that the Court should not get involved in intricate inquiries about domestic laws and procedures and that it should rely on judicial cooperation. It should only exclude, for example, evidence obtained in violation of fundamental human rights, or minimum internationally acceptable standards (such as the Guidelines of the United Nations Congress on Prevention of Crime and Treatment of Offenders), or by methods casting substantive doubts on its reliability.

Article 45. Quorum and judgment

With respect to the question of quorum and presence in the Trial Chamber, a general view seemed to be that the number of the members should preferably be odd (e.g., five) and that all members as well as the Prosecutor should be present at all stages of the trial in the interests of due process and fair trial (the same judges should be present in all hearings when relevant evidence was given, for example). A temporary absence of a judge should result either in the continuation of the trial with the remaining judges or the suspension of the trial. In case of prolonged absence of a judge, replacement should take place.

As for the method of decision-taking in the Trial Chamber, it was generally accepted that it should be by a majority of judges, although some support for unanimity rule (at least in case of a conviction) was also expressed. The judgment should be in writing and as complete as possible, including the questions of the competence and admissibility, as well as reasons for the judgment.

A view was expressed that there was no need to hold two separate hearings - one for the conviction or acquittal of the accused, and one for the sentence, since no jury trial was envisaged and both issues would be decided by judges. It was also suggested that in case of conviction, compensation for the victims or restitution of goods should be considered when appropriate. The view was

also expressed that the accused, when sentenced, should be notified of his right of appeal and the time-limit within which that right must be exercised.

In cases where the Trial Chamber could not agree on a decision, the general view was that the accused should be acquitted; this was not a case for a new trial. Paragraph 3 of article 45 should therefore be deleted.

Another issue was how to deal with dissenting or separate opinions. A view was expressed that such opinions should be made known together with the majority decision, as this would be consistent with the established practice in national and international courts; they might also become particularly relevant in cases of appeals or retrials. Another view was that the criminal proceedings were completely different from proceedings involving civil cases and dissenting or separate opinions would undermine the credibility and authority of the Court.

PART 6. APPEAL AND REVIEW

Three substantive issues were raised regarding appeal: (a) the grounds of appeal, (b) the persons who have the right to appeal, and (c) the proceedings on appeal.

Some support was expressed for the grounds enumerated in paragraph 1 of article 48: procedural error, error of fact or of law, or disproportion between the crime and the sentence. Whether an appeal on the grounds of jurisdiction and admissibility would be possible and at which point it should be made were issues also raised and it was suggested that they should be considered further. A suggestion was that appeals of the Prosecutor should only be allowed on the ground of error of law. Another view was that the grounds of appeal for the Prosecutor and the accused should be the same. It was also suggested that the ground of disproportion between the crime and the sentence as well as the notion of procedural error needed to be further clarified and elaborated.

As concerns the persons who have the right to appeal, it was generally agreed that both the accused and the Prosecutor should have this right. The convicted should be able to appeal on any substantive grounds. If the appeal by the convicted was general (i.e., not only against the sentence), the Appeals Chamber should re-examine the case in its entirety.

As for the question of the proceedings, it was pointed out that a provision on the time period in which an appeal ought to be made should appear in the statute (for example 30 days or longer should the Presidency allow it). The necessity to include more detailed and specific provisions concerning the manner in which the Appeals Chamber would apply rules of procedure and evidence was stressed.

It was also suggested that the judges of the Appeals Chamber should have the right to make public their dissenting opinions and that the number of judges should be odd (for example, seven).

In case of new evidence, a suggestion was that the Appeals Chamber should be able to transmit the case for review to the Trial Chamber with different composition. It was stressed that a complete separation of membership between the Trial and Appeals Chambers was necessary.

Terms such as "unfair [proceedings]" or "error of fact or law" in article 49 were considered not clear and needed to be further clarified. It was also considered necessary to define clearly the criteria according to which a new trial should be ordered as distinguished from those for a reversal or an amendment of a decision.

With regard to the effect of an appeal, it was suggested that unless the Trial Chamber decided otherwise, a convicted person should remain in custody pending an appeal, though the appeal should have an effect of suspending the execution.

As concerns the question of the revision of a conviction, it was felt that the grounds should go beyond those indicated in article 50 and should possibly

include cases where evidence proved to be false or invalid, a grave violation of duties of judges had occurred, or when new facts come to light which were unknown at the time of the trial. But the grounds for revision should be more limited than those for appeal. It seemed to be a general view that revision should not be subject to a time-limit and could take place any time (even after the death of the convicted, if requested by his relatives or anybody else concerned).

It was considered necessary to elaborate the rules for the determination of when to constitute a new Trial Chamber or reconvene the Trial Chamber or refer the matter to the Appeals Chamber.

In case of a revision of a conviction or of acquittal of a convicted, it was suggested that provision for compensation should be included in the statute.

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12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Jun YOSHIDA (Japan)

III. FURTHER DISCUSSION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

F. Complementarity

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 109 to 132, dealing with "Complementarity", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1), as well as additional proposals contained in document A/AC.249/L.20.

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G. General principles of criminal law

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 76 to 108, dealing with "General principles of criminal law", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1).

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Rapporteur: Mr. Yun YOSHIDA (Japan)

ARTICLES 46 AND 47

Penalties

1. Two main issues emerged from the discussion: the type of penalties and the relevant laws for determining penalties.

2. It was noted that the principle of legality (Nulla poena sine lege) required that penalties be defined in the draft statute of the Court as precisely as possible. The link was stressed between sentencing and penalties which should reflect the different degrees of culpability. A view was expressed that maximum and minimum penalties for each crime should be carefully set out in the draft statute. There was also a suggestion to include detailed regulations concerning, for example, minors, aggravating or attenuating circumstances (severity of damage or injury, prior conduct of the accused, means of commission of the crime, etc.), cumulative penalties for multiple crimes, an exhaustive list of aggravating circumstances and a non-exhaustive list of attenuating circumstances.

3. Life imprisonment and imprisonment for a specified period of time (years and/or months) were generally considered to constitute the basic penalties under the draft statute. Fines as a separate penalty were considered inadequate in view of the seriousness of the crimes and, moreover, the court might have difficulty collecting the fines owing to the lack of an enforcement mechanism under the draft statute. It was, however, recognized that fines might be appropriate for such "procedural" crimes as perjury or contempt of court or as supplementary to a penalty of imprisonment. The imposition of other penalties, such as disenfranchisement, denial or suspension of political rights or public office for the convicted, were also suggested.

4. While the death penalty was ruled out by some, others suggested that the death penalty should not be excluded a priori since it was provided for in many legal systems, especially in connection with serious crimes.

5. It was also noted that provisions concerning compensation of victims, restitution of property acquired through crime and the confiscation of property of the convicted, as well as provisions concerning penalties for legal persons (political organizations and youth movements, etc.) such as dissolution, confiscation and the like, should also be considered for inclusion in the draft statute. Many problems were raised in connection with the complex issue of compensation for the victims, including compensating a large number of victims of civil war, locating the source of funding and establishing criteria for distributing funds.

6. Regarding the relevant laws for determining penalties, various comments were made as regards the States whose national laws the court might take into account: (a) the State of nationality of the convicted person, (b) the State where the crime was committed, and (c) the State which had custody of and jurisdiction over the accused. A view was expressed that taking into account the various national laws had the drawback of vagueness and imprecision which could be contrary to the principle of legality. Moreover, this could result in manifest inequality and inconsistency, since domestic laws were not always identical in the penalties prescribed even for the same crimes. One suggestion was that the draft statute should include an international standard for the various crimes; the jurisprudence and the experience of the court could gradually expand this area. Another view, however, considered that the "renvoi" (referral) to national legislation could constitute a compromise among differing concepts and a solution to the difficult problem of determining the gravity of penalties. In the event that the national legislation did not provide for a specific crime, its provisions for an analogous crime could be taken into account.

7. It was suggested that the Court should have competence to impose appropriate punishment in cases where the convicted was sentenced for a lesser crime than he/she was originally indicted for. It was further suggested that the period of incarceration already served by the convicted prior to trial should be taken into account in his or her serving of the term of imprisonment.

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Rapporteur: Mr. Jun YOSHIDA (Japan)

III. FURTHER DISCUSSION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

H. Cooperation between States and the International Criminal Court

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 169 to 184, dealing with "Cooperation between States and the International Criminal Court", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1).

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I. International cooperation and judicial assistance

Note: This part of the report of the Preparatory Committee will reproduce paragraphs 185 to 220, dealing with "International cooperation and judicial assistance", which are contained in the summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996 (A/AC.249/1).

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Additional new proposals pertaining to topics discussed during the March-April session

Note: The new proposals introduced at the August session pertaining to topics discussed during the March-April session will be incorporated in the relevant sections of the summary of the proceedings of the Preparatory Committee (A/AC.249/1).

Definition of crimes 1/

Attention was drawn to the definitions of crimes contained in articles 17 to 20 of the draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission in 1996, with a view to considering the inclusion of such definitions in the statute. Article 20 of the statute should be reformulated along the lines of the draft Code with each crime being defined in a separate article identifying the essential elements of the offences and the minimum qualitative and quantitative requirements. The definition of

war crimes should clearly indicate in what circumstances, by which perpetrators and against which victims certain acts would constitute such crimes.

Complementarity 2/

The principle of complementarity should be defined as an element of the competence of the Court; the conditions, timing and procedures for invoking this principle should be clearly indicated; the person named in the submission to the Court or the State party invoking this principle should provide supporting information; the Court could hold a hearing before reaching a decision; the Prosecutor should be able to obtain protective measures to preserve evidence or to detain suspects pending the Court's decision; the person named in the request for transfer or the State requested to transfer an accused should be able to invoke the principle for the first time before the trial.

Consideration should be given to how the complementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes.

The Security Council: article 23 2/

It was suggested that the effective functioning of the Court could be enhanced without interfering with the primary responsibility of the Security Council for the maintenance of international peace and security by allowing the Court to investigate or prosecute a case unless the Security Council directs otherwise.

Final clauses 3/

It was suggested that the final clauses should provide a transitional arrangement for the transfer of cases from the ad hoc tribunals to the Court to avoid concurrent or parallel jurisdiction. However, attention was drawn to the differences in the temporal jurisdiction of the ad hoc tribunals and the Court which obviated the need for such an arrangement.

Notes

1/ This section will be added to chapter III.A, entitled "Scope of jurisdiction and definition of crimes", of document A/AC.249/1.

2/ This section will be added to chapter III.C, entitled "Complementarity", of document A/AC.249/1.

3/ This section will appear under the heading "Final clauses".